Filed 7/13/10 P. v. Ruiz CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE BONIFACIO RUIZ,

Defendant and Appellant.

F057526

(Super. Ct. No. VCF209929B)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gerald Sevier, Judge.

So'Hum Law Center and Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez and Leanne L. LeMon, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found appellant Jose Bonifacio Ruiz and two codefendants (brothers Abel Hanson and Jose "Joe" Hanson) guilty of two counts of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)); counts 1 and 2) and one count

of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 3).[1] Special allegations that the crimes in counts 1 and 2 were committed for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)(1)) were also found to be true. The victim in count 1 was Manuel Mendoza. The victim in count 2 was Marisa Guillen. The jury also found true a special allegation that appellant and his codefendants caused great bodily injury to Mendoza.

In a bifurcated proceeding the court found true a special allegation that appellant committed these crimes while released on bail (§ 12022.1). The court sentenced appellant to three years on count 1, plus three years for the great bodily injury enhancement, plus two years for the bail enhancement. Appellant received concurrent sentences of three years on count 2 and two years on count 3, and stayed the section 186.22, subdivision (b)(1) criminal street gang enhancement, resulting in a total prison term of eight years.

APPELLANT'S CONTENTIONS

Appellant contends: (1) the trial court erred in "admitting irrelevant and unduly prejudicial evidence that gang members who commit crimes are always committing them to benefit the gang – to gain respect"; (2) if the issue of the purportedly erroneous admission of evidence has been waived by failing to raise it in the trial court, then appellant was denied effective assistance of counsel by his trial counsel; (3) the jury's findings that the assaults were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1) are not supported by substantial evidence; and (4) the court erred in denying his motion for a mistrial. As we shall explain, we find these contentions to be without merit and will affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

FACTS

Sisters Angela Mendoza, Janie Diaz and Amanda Cabanyog each had a child baptized on the morning of September 13, 2008. One child was Marcos, the son of Angela Mendoza and Manuel Mendoza. Another was Michael or "Motito," the son of Janie Diaz and Mike Diaz. The third was Anthony, the son of Jose "Joe" Hanson and Amanda Cabanyog. In the afternoon the families had a party at a park in Porterville. The party at the park started at about 3:00 p.m. and went on all day and into the evening. There was food, a DJ playing music, and, as one witness described it, "everybody was drinking." At the end of the party at the park, people were invited to continue partying at the home of the three sisters' parents, the Cabanyogs. People began arriving at the home sometime after 10:00 p.m.

Jose "Joe" Hanson came to the Cabanyog home and brought his brother Abel Hanson and some friends. Joe was a member of the Varrio Central Poros or VCP street gang, a Norteno gang. "Poros" is a slang term for Porterville. Joe had the word "Central" tattooed on his back and a tattoo saying "fuck those who oppose" on one of his shoulders. Joe was also known as "Buck" or "Little Joe." Joe's brother Abel Hanson was a member of the same gang. Among his tattoos were the letters "VCP" on his fingers, the word "ene" (a Spanish designation for the letter N) on one arm, and the phrase "can't stop, won't stop." His moniker or nickname was "Bullet," and he had the words "Gangster Bullet" tattooed on one arm, and a tattoo of a large bullet on one calf. Detective Marcial Morales, the prosecution's gang expert, explained at trial that these tattoos were gang-related. He testified that the phrase "fuck those who oppose," for example, is "a common term used in the writings of the northern structure, the Norteno cause." Other VCP gang members who came to the Cabanyog home that night included Michael Gutierrez ("Duck"), Juvencio Godinez ("Hoover") and Jose Ruiz ("Boni").

The assaults took place in front of the Cabanyog home, located on the 1400 block of West Forest Avenue in Porterville. Marisa Guillen was either the wife or girlfriend of

the Cabanyogs' son Jesus Cabanyog. Marisa lived either in that house or in a house nearby, but referred to the Cabanyog home as "our house." At the time of trial in this matter, almost every non- law enforcement witness who testified claimed not to remember much or not to have seen much about the incident. These included Marisa Guillen. The day after the incident, however, investigating Officer Wayne Martin interviewed Marisa at the Porterville Police Department in a room equipped with an audio recording system. The interview was recorded without Marisa's knowledge, and this recording was played for the jury at the trial. In it she described the incident as follows.

When Joe's friends showed up (apparently at the park party earlier in the day) "[o]ur family was like, you know, we don't want to start problems so we let them stay." When Joe's friends later came to the house, someone asked Jose Ruiz ("Boni") to leave. It is not clear who made this request or why, but Marisa knew Boni because Boni used to date her husband or boyfriend Jesus Cabanyog's little sister. (Other testimony made clear that this younger sister was Myra, not one of the three sisters who had children baptized that day. Abel Hanson, who Marissa described as "the instigator," then said to Jose Ruiz (Boni): "You're going to let him talk to you like that. You better sock him." Boni then either hit or tried to hit the person who had asked him to leave. Abel Hanson and another one of Joe's "friends" then "jumped in" and one man was getting beaten up by three. Marisa herself then "had to jump in because, you know, I'm not going to let, you know, somebody get beat up." Marisa herself was then struck. It was Abel who was hitting her. When she was asked "Where did he hit you?" she stated that Abel hit her "everywhere" but not in the face and that he "scratched me here and then I have these bruises here." Marisa did not see any weapons. Abel Hanson was using his hands and was "punching me." After Marisa (Manuel Moendoza'a sister-in-law) was struck, Manuel Mendoza "came and he started hitting them, and then all these other guys came out of nowhere." !The site of this incident was of course the home of Manuel Mendoza'a in-laws. Other

testimony described what Mendoza was doing as "trying to break up a fight." Marisa said that "four ... guys were beating up Manuel" while the rest of Joe's friends were fighting "two guys" (apparently the man who had initially asked Boni to leave, and another man who had come to assist him). One of the four guys who beat up Manuel Mendoza was Abel Hanson, who Marisa saw "punching Manuel in the head." She also saw Boni punching Manuel. Manuel fell, and he "was on the ground so then they just started kicking him and stuff."

I.

THE EXPERT TESTIMONY

Appellant phrases his argument about what he considers to have been the erroneous admission of gang expert testimony as follows: "The trial court violated appellant's federal due process right to a fair trial by admitting irrelevant and unduly prejudicial evidence that gang members who commit crimes are always committing them to benefit the gang -- to gain respect." Appellant fails to specify where in the record on appeal there is any testimony by gang expert Morales that gang members who commit crimes are always committing them to benefit the gang. Nor have we found any such testimony. If no such testimony was given, then it was not admitted and the court could not have erred in admitting it.

In the text of his argument appellant says "Officer Morales's testimony was 'tantamount to expressing an opinion' as to appellant's guilt when he opined that the crimes were committed for the benefit of, in association with, or in furtherance of a criminal street gang." If we construe appellant's argument as an argument that the court erred in admitting expert testimony that appellant's crimes were committed for the benefit of, in association with or in furtherance of any criminal street gang, we still find appellant's contention lacking.

Section 186.22, subdivision (b) states in pertinent part:

"[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows:…."

The statute "requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

Detective Morales testified as follows:

"Q. Have you reached an opinion whether the alleged assault on September 13th, 2008, City of Porterville involving Marisa Guillen, Manuel Mendoza and then three defendants in the courtroom, was done for the benefit of, in association with or at the direction of the criminal street gang?

"A. In my opinion, it was.

"Q. What do you base your opinion on; what fact –

"THE COURT: Well, Mr. Greco, it's not clear to me what the opinion is. Actually, the question was compound. So I'll allow it as long – there are three possibilities. It's unclear what the opinion is.

"MR. GRECO: Okay.

"BY MR. GRECO:

"A. Have you reached an opinion whether the assault on Marisa Guillen and Manuel Mendoza was done for the benefit of the Norteno criminal street gang?

"A. Yes.

"Q. What is your opinion?

"A. The – the victims asked the defendants to leave the party, and that is – could be construed as an insult to them.

"MR. PEREZ: Objection, speculation.

"THE COURT: Overruled.

"THE WITNESS: It's also a form of disrespect.

"BY MR. GRECO:

"Q. Well, I don't understand. People get insulted and disrespected every day. How is that any different – how is that significant in the gang culture?

"A. You don't disrespect a gang member in front of his other home boys.

"Q. If a gang member gets disrespected in front of his home boys, is there anything in gang culture that the gang member needs to do?

"A. They need to basically defend their honor and in my – my opinion is that they would show force.

"Q. What – how in the – would a Norteno criminal street gang, how would they view a gang member who had been disrespected and didn't do something about it?

"A. They'd be considered weak.

"Q. What happens when your gang considers you weak?

"A. You're – you would be a wink link – a weak link within the gang; you know, you would possibly provide information to police. You wouldn't back your home boys up if it came down to battling a rival gang. You'd be looked upon as a weak person.

"Q. And does the Norteno criminal street gang tolerate weak members?

"A. No, they do not.

"Q. Do they do anything with weak members of –

"A. They – in a violent way, they have nothing to do with 'em.

"Q. You mentioned a concept of backup. Is that – is that unique to – or does that have some relevance to gang culture?

"A. Yeah, you want to have someone there to back you up in case you're outnumbered or you want to show force in numbers.… [¶] … [¶]

"Q. Is there anything – you were sitting in court when you heard the recorded testimony of Ms. Guillen?

"A. Yes.

"Q. Was there anything about the way she described that that [sic] fight started and was carried out that shows that it was done in – in a manner consistent with a Norteno criminal street gang being involved?

"A. I distinctly heard in that recording it was three on eight.

"Q. And how does that show gang culture touching onto this case?

"A. That's how the majority of assaults by gang members are committed.

"Q. Hypothetical; if one gang member starts getting into a fight with a nongang member, and his home boys, the other gang members, are there, let's assume Norteno gang members, would those Norteno gang members have to back up the home boy in the fight?

"A. They'd be expected to. [¶] … [¶]

"Q. Is it unusual with a gang crime for witnesses to not want to give statements?

"A. It's very common.

"Q. How would you describe the level of cooperation regards to witnesses testifying in court on gang cases?

"A. They -- it's hardly ever that you get a victim or witness to come in and testify against the – the defendants if they are gang, just fear of retaliation, that kinda thing.

"Q. Is that fear of retaliation – does the Norteno criminal street gang actually retaliate against people?

"A. They do, and I've worked cases where it's happened. [¶] … [¶]

"Q. Have you reached an opinion whether the crime September 13, 2008, was done in association with Norteno criminal street gang members?

"A. My opinion, it was based on the three defendants being together at the time the crime was committed.

""Q. Does it – being together at the time, does it matter in your opinion whether they participated in the fight? Does that bolster it or subtract from it?

"A. No, it bolsters it 'cause you have more numbers.

"Q. Is there any gang significance to the statement, according to Ms. Marisa Guillen attributed to Abel, 'Are you gonna let him talk to you like that? You better sock him'? Is there any gang significance to that?

"A. There's direction being stated for something – for someone to do something about what was said or the disrespect factor come ins.

"Q. Would it reinforce or detract from your opinion the fact that a fight occurred right after that statement?

"A. It would reinforce it. [¶] … [¶]

"BY MR. GRECO:

"Q. Do you have an opinion whether this crime on September 13, 2008, the felonious assault of Marisa Guillen and Manuel Mendoza, was committed at the direction of the Norteno criminal street gang?

"MR. SCHULTE: Objection.

"MS. HOWARD: Your Honor, I object to the manner in which –

"MR. SCHULTE: Go ahead.

"MS. HOWARD: – he has asked the question.

"THE COURT: Sustained. It's argumentative, counsel.

"BY MR. GRECO:

"Q. Do you have an opinion whether the assault on September 13, 2008, on Marisa Guillen, Manuel Mendoza was done at the direction of the Norteno criminal street gang?

"MR. SCHULTE: Objection, it's still a legal conclusion.

"THE COURT: Sustained.

"BY MR. GRECO:

"Q. Why would it be significant if Abel told Boni to do something? Would there be a gang significance from Abel telling Boni to do something?

"A. I would observe that as Boni taking orders.

"Q. What do you mean taking orders?

"A. Someone with a higher status is directing him to do something. He's taking orders.

"Q. Is your opinion that Abel has a higher status than Boni?

"A. In my opinion, he does.

"Q. And what do you base that on?

"A. Just prior history with Abel Hanson."

We begin with some observations about this testimony. First, we have noted that "whether and how a crime was committed to benefit or promote a gang" can be a proper subject of admissible expert testimony. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.) The witness's answer to the question as to whether the crimes were committed for the benefit of a criminal street gang was actually a nonresponsive answer that appears to have been the witness's explanation as to why the crimes were committed for the benefit of the gang. When Morales was asked whether he had an opinion as to whether the crimes were committed at the direction of the gang, an objection to the question was sustained and the witness did not answer it. When he was asked if he had reached an opinion as to whether the attack "was done in association with Norteno criminal street gang members," his answer appears to have been an explanation as to why he held that opinion. Construing this testimony as favorably as we can to appellant, what we are left with are two opinions to which no objection was raised – that the assaults were committed for the benefit of the gang and "in association with ... gang members."

Objections to evidence cannot be raised for the first time on appeal, after the testimony has been given and after the trial has long since ended. (Evid. Code, § 353.) "'A verdict may not be set aside on the basis of the erroneous admission of evidence ... unless the party asserting error has preserved the question by a timely and specific objection to the admission of the evidence, or by a motion to strike or exclude the evidence.' [Citation.] '[T]he objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citations.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1261.) Appellant's contention that the expert testimony was erroneously admitted has therefore been waived

Appellant cites *People v. Albarran* (2007) 149 Cal.App.4th 214, in support of his argument that the court erred "by admitting irrelevant and unduly prejudicial evidence that gang members who commit crimes are always committing them to benefit the gang," And argues that this erroneous admission violated his right to due process of law, but fails to mention that the gang evidence admitted in *Albarran* was admitted over defense objection. (*Id*. at pp. 219-220.) "We reject the constitutional claims at the threshold, for we find defendant failed to preserve these issues for appeal by failing to object on the … federal constitutional grounds now asserted." (*People v. Brown* (2003) 31 Cal.4th 518, 546.) Appellant correctly notes that a ruling admitting gang evidence is reviewed for abuse of discretion (see *Brown*, 31 Cal.4th at p. 547), but in appellant's case the evidence was admitted without objection and there is no ruling for us to review.

II.

APPELLANT WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL

The law pertaining to a defendants' right to the effective assistance of counsel is well established.

"'Every person accused of a criminal offense is entitled to constitutionally adequate legal assistance.' (*People v. Pope* (1979) 23 Cal.3d 412, 424 [152 Cal.Rptr.732, 590 P.2d 859, 2 A.L.R.4th 1] (*Pope*); see also *People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 279 P.2d 8389] (*Ledesma*).) To establish a claim of inadequate assistance, a defendant must show counsel's representation was 'deficient' in that it 'fell below an objective standard of reasonableness.…[¶] … under prevailing professional norms.' (*Strickland* [*v. Washington* (1984) 466 U.S. 668,], 688 [104 S.Ct. at pp. 2064-2065]; *In re Jones* (1996) 13 Cal.4th 552, 561 [54 Cal.Rptr.2d 52, 917 P.2d 1175].) In addition, a defendant is required to show he or she was prejudiced by counsel's deficient representation. (*Strickland, supra*, 466 U.S. at p. 688 [104 S.Ct. at pp. 2064-2065]; *Ledesma, supra*, 43 Cal.3d at p. 217.) In determining prejudice, we inquire whether there is a reasonable probability that, but for counsel's deficiencies, the result would have been more favorable to the defendant. (*Strickland, supra*, 466 U.S. at p. 687 [104 S.Ct. at p. 2064]; *In re Sixto* (1989) 48 Cal.3d 1247, 1257 [259 Cal.Rptr. 491, 744 P.2d 164].)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' (*Strickland, supra*, 466 U.S. at p. 689 [104 S.Ct. at p. 2065]; *In re Jones, supra*, 13 Cal.4th at p. 561), and we accord great deference to counsel's tactical decisions. (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070 [275 Cal.Rptr. 384, 800 P.2d 862] (*Fields*).) Were it otherwise, appellate courts would be required to engage in the '"perilous process"' of second-guessing counsel's trial strategy. (*Pope, supra*, 23 Cal.3d at p. 426.) Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' (*People v. Fosselman* (1983) 33 Cal.3d 572, 581 [189 Cal.Rptr. 855, 659 P.2d 144] (*Fosselman*); see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264 [62 Cal.Rptr.2d 437, 933 P.2d 1134]; *People v. Avena* (1966) 13 Cal.4th 394, 418 [53 Cal.Rptr.2d 301, 916 P.2d 1000] (*Avena*).)" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980 (disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421); in accord, see also *People v. Anderson* (2001) 25 Cal.4th 543, 569, and *People v. Stewart* (2004) 33 Cal.4th 425, 459.)

Appellant argues "[i]f this court finds that appellant waived this error by failing to object, then defense counsel provided ineffective assistance." His argument does not say what questions should have been objected to, what the ground or grounds for any such objection should have been, and does not attempt to explain why those grounds would

have been meritorious. Even when there is a meritorious objection to some questions asked in the course of a trial, the making and sustaining of an objection will often simply lead to the rephrasing of the question in an unobjectionable form. (See *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197.) The expert testimony given in this case was nothing out of the ordinary. Permissible gang expert testimony has included "'testimony about the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant's membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citations], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations].'" (*Ibid*.; *People v. Killebrew*, *supra*, 103 Cal.App.4th at pp. 656-657.) Appellant fails to show that his trial counsel's representation of him fell below an objective standard of reasonableness under prevailing professional norms. (*People v, Frye*, *supra,* 18 Cal.4th 894.)

III.

SUBSTANTIAL EVIDENCE SUPPORTS THE § 186.22, SUBDIVISION (b)(1) ENHANCEMENTS

Appellant then argues that the evidence was insufficient to support the section 186.22, subdivision (b) findings. We are not persuaded. When a criminal conviction is challenged as lacking evidentiary support, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could fine the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of

the judgment.' [Citations.]" (*People v. Hillery* (1965) 62 Cal.2d 692, 702.) "[I]t is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) "[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1139, fn. omitted.)

The statute "requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in association with a gang." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) "[T]he jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*Ibid*.) The "specific intent" prong of the statute does not require a specific intent to promote, further, or assist in any criminal conduct other than the criminal conduct constituting the crime currently being committed. "By its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than other criminal conduct." (*People v. Romero* (2006) 140 Cal.App.4th 15, 19.) "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see also *People v. Morales*, supra, 112 Cal.App.4th at p. 1198.) "[S]pecific intent to *benefit* the gang is not required." (*Ibid*.)

"[T]he typical close case is one in which one gang member, acting alone, commits a crime." This is not a close case. At a minimum there were the three defendants plus the gang members "Hoover" and "Duck." Marisa Guillen estimated that there were eight men, plus Abel's girlfriend Valerie Barajas, who all eventually fled. Jurors could reasonably infer that each defendant acted "in association with any criminal street gang"

and did so "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

Appellant relies on *People v. Ramon* (2009) 175 Cal.App.4th 843 as support for his argument that there was insufficient evidence to support the jury's section 186.22, subdivision (b)(1) findings. In *Ramon* the defendant was stopped in a stolen truck with a handgun under the driver's seat. He was convicted of four crimes. The jury found that three of the crimes (receiving a stolen vehicle, § 496d); possession of a firearm by a felon, (§ 12021; subd. (a)(1)); and carrying a loaded firearm for which he was not the registered owner (§12031, subd. (a)(2)(F)), were committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members. A gang expert gave testimony about possible future crimes gang members might commit (including robbery, burglary and carjacking). This court found the expert's testimony to be insufficient evidence to support the findings that the three crimes of which the defendant were convicted had been committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) "The facts on which [the expert] based his testimony were insufficient to permit him to construct an opinion about Ramon's specific intent in this case. His opinion, therefore, cannot constitute substantial evidence to support the jury's finding on the gang enhancement." (*Ramon*, *supra*, 175 Cal.App.4th at p. 852.) In the case presently before us, however, once the jury had evidence to convince it that the three defendants and at least two of their other cohorts were gang members, and evidence that the crimes the gang commits include violent assaults, it might well have found the section 186.22, subd. (b)(1) allegations to be true without any further expert testimony at all. The jury hardly needed Detective Morales to tell them his opinion about whether each defendant's crimes were committed "in association with Norteno criminal street gang members." And Morales was never asked whether any defendant acted "with the specific intent to promote, further, or assist

in any criminal conduct by gang members" (§ 186.22, subd. (b)(1).) Substantial evidence supports the jury's section 186.22, subdivision (b)(1) findings.[2]

IV.

THE MOTION FOR MISTRIAL

One morning before the start of testimony the court bailiff reported to the trial judge that two jurors had told him they felt two of the defendants were staring at them in a "threatening manner." The defendants purportedly doing the staring were identified as Abel Hanson and Joe Hanson (not appellant Ruiz). Abel Hanson and Joe Hanson moved for a mistrial. The court questioned the two jurors and was assured by them that they could follow the law and properly perform their duties as jurors, but refused to grant a mistrial. Neither of the jurors expressed any reluctance to continue serving as a juror.

Appellant now contends that the court erred in denying his motion for a mistrial. The contention fails because appellant made no motion for a mistrial. The motion was made by the other two defendants. Appellant asserts that his trial counsel was ineffective for failing to join in the motion, but, aside from the merits of the motion, an obvious possible tactical reason appears why trial counsel would not do so (*People v. Frye*, *supra*,

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[2] Appellant also makes a perfunctory assertion that "there was insufficient evidence of street terrorism" but his brief makes no mention of subdivision (a) of section 186.22 (except to say that appellant was convicted of violating it) and makes no attempt to explain how the evidence was insufficient to support his count 3 conviction. He cites *People v. Ramon, supra,* but that case did not involve a section 186.22, subdivision (a) conviction and contains no discussion of subdivision (a) of section 186.22. Matters perfunctorily asserted without argument in support are not properly raised and need not be considered. (*People v. Marshall* (1990) 50 Cal.3d 907, 945, fn. 9; *People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn. 15; *People v. Williams* (1997) 16 Cal.4th 153, 206.)

18 Cal.4th 894) -- his client was not one of the starers, and thus stood to look better in the eyes of the jury than they would.

DISPOSITION

The judgment is affirmed

_____
Ardaiz, P.J.

WE CONCUR:

_____
Levy, J.

_____
Gomes, J.